

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
2013 MSPB 22**

Docket No. DE-3330-11-0370-I-1
DE-3330-11-0380-I-1

John Paul Jones, III,

Appellant,

v.

Department of Health and Human Services,

Agency.

March 25, 2013

John Paul Jones, III, Albuquerque, New Mexico, pro se.

Murray Kampf, Esquire, Atlanta, Georgia, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The agency has filed a petition for review, and the appellant has filed a cross petition for review of the initial decision that granted in part and denied in part the appellant's request for corrective action under the Veterans Employment Opportunities Act of 1998 (VEOA). For the reasons set forth below, we GRANT the agency's petition for review, DENY the appellant's cross petition for review,

VACATE the portion of the initial decision that ordered corrective action, and AFFIRM the rest of the initial decision.¹

BACKGROUND

¶2 In February 2010, the agency issued competitive, noncompetitive, and merit promotion vacancy announcements for a Public Health Advisor (PHA) position with the agency's Center for Disease Control and Prevention (CDC). *Jones v. Department of Health and Human Services*, MSPB Docket No. DE-3330-11-0380-I-1, Initial Appeal File (IAF0380), Tab 5, Subtab 4a; Tab 54 at 5-6, Exhibit 14. The appellant, a 5-point preference eligible veteran, applied for the position under the competitive vacancy announcement HHS-CDC-D3-2010-0205 (Announcement 205).² IAF0380, Tab 5, Subtab 4c; Tab 54, Exhibit 1. This was an open continuous vacancy announcement that was open from February 5, 2010, to February 4, 2011. *Id.*, Tab 5, Subtab 4a. The announcement listed numerous potential duty stations, including Kazakhstan and Uganda, and instructed applicants to specifically identify all locations and grades for which they desired consideration. IAF0380, Tab 5, Subtab 4a at 1-3.

¶3 Upon receiving a request to fill a PHA position in Kazakhstan, agency Human Resources (HR) employee Tiffany Anthony retrieved an applicant listing report (ALR) generated under Announcement 205 for applicants who listed Kazakhstan as a potential duty station, including the appellant. IAF0380, Tab 5, Subtab 4b, Subtab 4c at 4; Tab 63, Initial Decision (ID) at 5. Based upon the applicants' responses to the application questions, the agency's automated

¹ Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

² The announcement number for the noncompetitive vacancy announcement was HHS-CDC-T3-2010-0156-NC. IAF, Tab 54, Agency Exhibit 14 at 2-4. The announcement number for the merit promotion vacancy announcement was HHS-CDC-T3-2010-0156-MP (Announcement 156-MP). *Id.* at 5-6.

QuickHire application system placed applicants in one of three categories on the ALR: Best Qualified, Well Qualified, and Qualified. IAF0380, Tab 5, Subtab 4b; ID at 5. The QuickHire system placed the appellant in the Well Qualified category of applicants for the Kazakhstan position under Announcement 205. IAF0380, Tab 5, Subtab 4b. Ms. Anthony reviewed the qualifications of the Kazakhstan applicants who were rated as Best Qualified on the ALR for Announcement 205, determined whether they were, in fact, qualified for the position, and made a notation next to their names to that effect.³ *Id.*; Hearing CD (HCD), testimony of Anthony. She also reviewed the qualifications of Kazakhstan applicants who applied for the position under the concurrent vacancy announcements and, for those applicants who also applied under Announcement 205, noted on the ALR for Announcement 205 whether they were qualified for the position.⁴ IAF0380, Tab 5, Subtab 4b; HCD, testimony of Anthony.

¶4 Ms. Anthony also reviewed the Kazakhstan applicants' preference eligibility documentation to determine if the applicants were entitled to any preference claimed. IAF0380, Tab 5, Subtab 4b; HCD, testimony of Anthony. Although the notation "TP"⁵ next to the appellant's name on the ALR for Announcement 205 indicated that he was entitled to veterans' preference, Ms. Anthony superimposed the letters "NV" over TP, thereby erroneously indicating that he was a nonveteran. IAF0380, Tab 5, Subtab 4b.

³ Ms. Anthony stated that she did not evaluate the candidates rated below Best Qualified because the selecting official stated that there was a sufficient pool of candidates without looking at the candidates who were not rated Best Qualified. Hearing CD (HCD), testimony of Anthony.

⁴ As the administrative judge explained in the initial decision, it is a common practice in the agency's HR department to aggregate qualification determinations from multiple ALRs generated by concurrent announcements for a single position onto one or more of the reports as a matter of convenience. ID at 6 (citing HCD, testimony of Mathis).

⁵ The letters "TP" stand for tentative (veterans') preference. *See Endres v. Department of Veterans Affairs*, [107 M.S.P.R. 455](#), ¶ 2 (2007).

¶5 A certificate of eligible candidates was generated for each of the three vacancy announcements in connection with the Kazakhstan vacancy. IAF0380, Tab 54, Agency Exhibit 14. The certificate of eligibles for Announcement 205 contained the names of only two candidates, both of whom were rated as Best Qualified on the ALR for Announcement 205.⁶ IAF0380, Tab 5, Subtab 4b; Tab 54, Exhibit 14 at 1. From the three concurrent announcements, a total of seven Kazakhstan applicants were referred to a selection panel for further consideration, all of whom applied under the merit promotion or noncompetitive vacancy announcements, and three of whom also applied under Announcement 205. IAF0380, Tab 5, Subtab 4b; Tab 54, Exhibits 14, 16. Three of the seven Kazakhstan applicants whose resumes were reviewed by management officials were interviewed for the position. IAF 0380, Tab 24, Subtab 4J. The agency did not make a selection for the Kazakhstan position under any of these vacancy announcements and allowed the certificates to expire. *Id.*, Tab 54, Exhibits 14, 17; HCD, testimony of Anthony. Instead, on July 26, 2011, the agency issued new concurrent competitive, noncompetitive, and merit promotion vacancy announcements for a PHA position.⁷ *Jones v. Department of Health and Human Services*, MSPB Docket No. DE-3330-12-0137-I-1, Initial Appeal File, Tab 7, Subtab 2e. The agency filled the Kazakhstan vacancy under one of those announcements on November 10, 2011. *Id.*, Tab 8, Subtab 2h.

⁶ Although Ms. Anthony changed the category rating for another applicant from Well Qualified to Best Qualified by placing the letters “BQ” next to his name on the ALR for Announcement 205, his name was not on the certificate of eligibles for the Kazakhstan vacancy generated under Announcement 205. IAF0380, Tab 5, Subtab 4b; Tab 54, Exhibit 14 at 1. Rather, that employee, who also applied for the Kazakhstan vacancy under Announcement 156-MP, was on the certificate of eligibles for the Kazakhstan vacancy generated under that announcement. IAF, Tab 54, Exhibit 14 at 6.

⁷ The appellant has filed another VEOA appeal challenging his nonselection for the Kazakhstan vacancy under the competitive vacancy announcement issued on July 26, 2011; that appeal is currently pending before the Board. *Jones v. Department of Health and Human Services*, MSPB Docket No. DE-3330-12-0137-I-1.

¶6 In March 2010, the agency issued a competitive vacancy announcement HHS-CDC-D3-2010-0244 (Announcement 244) for a position as a GS-13/14 PHA with the CDC, and the appellant applied for a position under that announcement. *Jones v. Department of Health and Human Services*, MSPB Docket No. DE-3330-11-0370-I-1, Initial Appeal File (IAF0370), Tab 5, Subtabs 4b, 4c. The QuickHire system listed the appellant as “NV” in his application package under Announcement 244; however, his dates of military service were listed, and his application materials described his service. *Id.*, Subtab 4c. There was no request to fill a vacancy under Announcement 244 after the appellant submitted his application. *Id.*, Subtab 4a; HCD, testimony of Mathis.

¶7 The appellant filed complaints with the Department of Labor (DOL) regarding his nonselection under Announcements 205 and 244. IAF0380, Tab 1 at 11-12; IAF0370, Tab 4 at 5-6. DOL determined that the evidence did not support his allegation that the agency violated his veterans’ preference rights with respect to either announcement. IAF0380, Tab 1 at 11-12; IAF0370, Tab 1 at 11-12. On May 25, 2011, the appellant filed a VEOA appeal with the Board alleging that the agency violated his veterans’ preference rights by failing to select him for a position under Announcement 244. IAF0370, Tab 1. On May 31, 2011, the appellant filed a VEOA appeal with the Board alleging that the agency violated his veterans’ preference rights by failing to select him for the position in Kazakhstan, as well as a position in Uganda, under Announcement 205. IAF0380, Tab 1. He requested a hearing in both appeals. *Id.* at 2; IAF0370, Tab 1 at 2. The administrative judge joined the appeals for adjudication. IAF0370, Tab 7.

¶8 After holding a hearing, the administrative judge issued an initial decision that granted in part and denied in part the appellant’s request for corrective action. *ID* at 2. The administrative judge found that the agency violated the appellant’s veterans’ preference rights in the rating process for the Kazakhstan position under Announcement 205 by failing to afford him any veterans’

preference when applicants were rated and ranked in categories, as required by [5 U.S.C. § 3319\(b\)](#).⁸ *Id.* at 9. Based on this finding, the administrative judge ordered the agency to fully reconstruct the selection process for the Kazakhstan position. *Id.* at 16.

¶9 With respect to the Uganda position under Announcement 205, the administrative judge found that the appellant failed to prove by preponderant evidence that he applied for a position in Uganda. *Id.* at 13-14. Therefore, the administrative judge found the appellant lacks standing to challenge the Uganda selection process under the VEOA, and the Board lacks jurisdiction to decide whether the agency violated a law or regulation related to veterans' preference with regard to the Uganda position under Announcement 205. *Id.* at 14.

¶10 The administrative judge also found that the appellant did not establish that the agency violated a law or regulation relating to veterans' preference with respect to Announcement 244 because there was no vacancy to fill under this announcement after the appellant applied, and the agency never made any final determination on the appellant's veterans' preference or referred candidates on a certificate of eligibles on which the appellant was not afforded the veterans' preference he is due. *Id.* at 15-16.

¶11 The agency has filed a petition for review, the appellant has filed a cross petition for review, and the agency has filed a response to the appellant's cross petition for review. Petition for Review (PFR) File, Tabs 1, 3, 5.

⁸ Section 3319(b), which governs category ranking procedures, provides that "[w]ithin each quality category . . . preference-eligibles shall be listed ahead of individuals who are not preference eligibles." [5 U.S.C. § 3319\(b\)](#).

ANALYSIS

The administrative judge correctly found that the agency failed to accord the appellant veterans' preference in the rating process for the Kazakhstan position under Announcement 205.

¶12 On review, the agency challenges the administrative judge's finding that it violated [5 U.S.C. § 3319](#)(b) by failing to place the appellant ahead of the nonpreference eligible candidates in the Well Qualified category on the ALR for the Kazakhstan position generated under Announcement 205. PFR File, Tab 1 at 11-15. The agency asserts that, contrary to the administrative judge's finding, it accorded the appellant the veterans' preference to which he is entitled by placing him at the top of the Well Qualified category, ahead of all nonveterans. *Id.* at 12.

¶13 We find this argument unpersuasive. The appellant's name appears ahead of the nonveterans in the Well Qualified category on the ALR for Announcement 205 because the ALR initially correctly indicated that the appellant was entitled to veterans' preference. IAF0380, Tab 5, Subtab 4b. As previously noted, however, Ms. Anthony altered the ALR by superimposing the letters NV over the letters TP corresponding with the appellant's name. *Id.* During the proceedings below, the agency acknowledged that the annotation in question erroneously indicated that the appellant was a nonveteran. IAF0380, Tab 54 at 5. Given these circumstances, we disagree with the agency's assertion on review that it accorded the appellant the veterans' preference to which he is entitled in the rating process for the Kazakhstan vacancy.

Because the appellant did not suffer any harm as a result of the agency's failure to afford him veterans' preference, reconstruction of the selection process for the Kazakhstan position is not warranted.

¶14 Alternatively, the agency argues that, even if it failed to accord the appellant veterans' preference, this error did not affect the outcome of the selection process. PFR File, Tab 1 at 15. We agree. As noted above, the agency did not select anyone for the Kazakhstan position under Announcement 205 or the concurrent vacancy announcements. HCD, testimony of Anthony. Thus, even if

the agency had properly afforded the appellant veterans' preference in the rating process for the Kazakhstan vacancy under Announcement 205, the appellant would not have been selected for the PHA position in Kazakhstan under that announcement. Consequently, there is no basis to find that the appellant suffered any harm as a result of the agency's error in failing to afford him veterans' preference in the rating process for that position.

¶15 Also, the appellant was rated Well Qualified, not Best Qualified. Thus, under [5 U.S.C. § 3319\(b\)](#), if the agency had accorded him veterans' preference, his name would have been at the top of the list of candidates rated as Well Qualified. As noted above, however, the only Kazakhstan applicants under Announcement 205 whose names appeared on the certificate of eligibles for Announcement 205 were rated Best Qualified on the ALR for that announcement.⁹ Thus, even if the agency had made a selection for the Kazakhstan vacancy under Announcement 205 or the concurrent vacancy announcements, it would not have selected the appellant.

⁹ As previously explained, although Ms. Anthony annotated the ALR for Announcement 205 to indicate that another applicant was rated Best Qualified, his name was not on the certificate of eligibles for the Kazakhstan vacancy generated under Announcement 205. IAF0380, Tab 5, Subtab 4b; Tab 54, Exhibit 14 at 1. Rather, his name was on the certificate of eligibles for the Kazakhstan vacancy generated under Announcement 156-MP. IAF0380, Tab 54, Exhibit 14 at 5-6. Thus, that applicant's name was referred to the selecting official for further consideration under Announcement 156-MP, not Announcement 205.

We note that, under [5 U.S.C. § 3319\(c\)\(1\)](#), “[a]n appointing official may select any applicant in the highest quality category or, if fewer than 3 candidates have been assigned to the highest quality category, in a merged category consisting of the highest and second highest quality categories.” The certificate of eligibles for the Kazakhstan vacancy under Announcement 205 contained the names of only two candidates from the highest quality category, Best Qualified. However, it appears that it also should have contained the other applicant who was rated as Best Qualified, since he appeared on the ALR for Announcement 205 and was ultimately rated Best Qualified. *See* IAF0380, Tab 5, Subtab 4b; Tab 54, Exhibit 14. In any event, no selection was made for this position under either Announcement 205 or the concurrent vacancy announcements.

¶16 Rather than direct the agency to reconstruct the selection process for a situation in which the appellant suffered no harm, we find that the appropriate disposition in this case is to deny the appellant's request for corrective action with respect to the Kazakhstan position under Announcement 205 for lack of an available remedy. Accordingly, we VACATE the order directing the agency to reconstruct the selection process for the Kazakhstan position.

The appellant has not proven that the administrative judge abused his discretion in his discovery and evidentiary rulings.

¶17 In his cross petition for review, the appellant challenges the administrative judge's evidentiary and discovery rulings. PFR File, Tab 3 at 9-10. In particular, he argues that the administrative judge improperly denied his request to submit as evidence the ALRs for vacancy announcements HHS-CDC-D1-2010-0017 and HHS-CDC-D1-2010-0053. *Id.* at 9; IAF0370, Tab 56 at 9. Because neither of these announcements is at issue in this appeal,¹⁰ we find that the administrative judge properly denied the appellant's request to submit the ALRs for these vacancy announcements as irrelevant. IAF0370, Tab 57.

¶18 The appellant also contends that the administrative judge improperly denied numerous discovery motions. PFR File, Tab 3 at 9. The Board will not find reversible error in an administrative judge's discovery rulings absent an abuse of discretion that prejudiced the appellant's substantive rights. *White v. Government Printing Office*, [108 M.S.P.R. 355](#), ¶ 9 (2008). The appellant has failed to show how the information he requested would have affected the administrative judge's findings. Consequently, the appellant has failed to establish that the administrative judge abused his discretion in denying the appellant's discovery motions.

¹⁰ Both of these announcements pertain to a VEOA appeal filed by the appellant in 2010. *Jones v. Department of Health and Human Services*, MSPB Docket No. DE-3330-10-0168-I-1.

The administrative judge correctly found that the appellant failed to establish by preponderant evidence that he applied for a position in Uganda.

¶19 In his cross petition for review, the appellant also challenges the administrative judge's finding that the appellant failed to prove by preponderant evidence that he applied for a position in Uganda. PFR File, Tab 3 at 15-17. The Board has held that a veteran who applies for vacancies in some locations but not others does not raise a nonfrivolous allegation of a veterans' preference violation if a nonveteran is hired for a location for which he did not apply. *Letchworth v. Social Security Administration*, [101 M.S.P.R. 269](#), ¶ 7 n.5 (2006). Announcement 205 listed Uganda among the countries where a vacancy might be filled and explicitly directed applicants to identify all locations for which they wished to be considered. IAF0380, Tab 5, Subtab 4a at 1, 3. Thus, applicants who wanted to be considered for countries listed in the announcement were required to identify those countries specifically. Although the appellant specifically identified several African countries listed on Announcement 205 as potential duty stations on his application, Uganda was not one of them. *See* IAF, Tab 5, Subtab 4c at 3-4. Thus, the administrative judge correctly found that the appellant failed to prove that he applied for a PHA position in Uganda. ID at 14.

The administrative judge correctly denied the appellant's request for corrective action with respect to Announcement 244.

¶20 On review, the appellant also states that he disagrees with the administrative judge's finding that he did not establish that the agency violated a law or regulation relating to veterans' preference with respect to Announcement 244. PFR File, Tab 3 at 17. Specifically, he claims that the administrative judge improperly accepted "without question" the agency's assertion that no position was filled under this announcement number. *Id.*

¶21 We find this argument unavailing, as the record supports the administrative judge's finding with respect to Announcement 244. In both a written affidavit and during the hearing, Kelly Mathis, the HR supervisor responsible for

Announcement 244, stated under oath that the agency did not receive any requests to fill a position under that announcement. IAF0370, Tab 5, Subtab 4a; ID at 7 (citing HCD, testimony of Mathis). The appellant has offered no evidence to refute this statement. The appellant's arguments thus constitute mere disagreement with the administrative judge's reasoned findings that are supported by the record and entitled to deference. *See Crosby v. U.S. Postal Service*, [74 M.S.P.R. 98](#), 105-06 (1997) (finding no reason to disturb the administrative judge's findings where the administrative judge considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions).

ORDER

¶22 Accordingly, we VACATE the initial decision's order for corrective action and AFFIRM the remainder of the initial decision. This is the final decision of the Merit Systems Protection Board in these appeals. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after the date of this order. *See* [5 U.S.C. § 7703\(b\)\(1\)\(A\)](#) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's [Rules of Practice](#), and [Forms](#) 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.